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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

CHARLES BELAND,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matters Involved

This is the second petition for certiorari involving petitioner, the first having been denied, 313 U. S. 585. In the Circuit Court the case was No. 9601, and is reported in 117 Fed. (2d) 958. Upon the denial of certiorari by this Honorable Court (313 U. S. 585) the mandate of the Circuit Court issued, directing the trial court to resentence petitioner *in accordance with the opinion of the Circuit Court.* (R. 22-23.)

After the mandate of the Circuit Court had issued, and on November 10, 1941, three days after the peti-

tioner had surrendered to the United States Marshal for the Northern District of Texas, at Fort Worth, for the purpose of entering upon the service of such legal sentence that the Court might impose *in accordance with the opinion of the Circuit Court* and its mandate, and prior to being sentenced, the United States Attorney for the Northern District of Texas filed an information under 26 U. S. C. A., Section 2557(b) (7), setting forth that on two previous occasions petitioner had been convicted of selling morphine, a derivative of opium, in violation of the narcotic laws of the United States. (R. 18-22.)

Thereafter, on the 11th day of November, 1941, the trial court sentenced petitioner to serve a term of imprisonment of seven (7) years in an institution of the penitentiary type to be designated by the Attorney General of the United States. (R. 24-26.)

Be it noted at this point, that petitioner, by counsel, agreed to a stipulation as per the following:

> "It is stipulated and agreed that the defendant Charles Beland was indicted herein, together with others, in forty-one substantive offenses against the Narcotic laws of the United States and in one count (being the forty-second count of the indictment) with conspiracy to violate such laws and that on July 18, 1940, he was found guilty and convicted on counts sixteen, eighteen, and forty-two of the indictment and thereupon sentenced by the Court to serve a term of five years imprisonment generally, on count sixteen and forty-two of the indictment and in addition thereto, that he serve ten years imprisonment on count eighteen

of the indictment, said latter sentence being suspended.

"It is further stipulated that thereafter the defendant appealed said judgment and sentence to the United States Circuit Court of Appeals for the Fifth Circuit and on the 27th day of February, 1941, said Circuit Court of Appeals entered its judgment reversing this Court as to the conviction on counts sixteen and eighteen of the indictment and affirmed the conviction as to the forty-second count of the indictment. Petition for rehearing was filed on March 19, 1941, and the same was denied on March 20, 1941. Petition for writ of certiorari was thereafter duly filed in the Supreme Court of the United States and denied.

"It is further stipulated that said defendant surrender himself into the custody of the United States Marshal for the Northern District of Texas at Fort Worth, on the 7th day of November, 1941, and has since remained in such custody.

"That on the 10th day of November, 1941, the United States of America, by and through its United States Attorney for the Northern District of Texas, filed an information herein referring to certain prior offenses and convictions of the defendant, he admits the allegations contained therein. It is further stipulated that no information with reference to the prior offenses or convictions of the said defendant was filed herein prior to the one aforesaid and that at the time of his original conviction herein and sentence no such information as aforesaid had been filed or was pending." (R. 16-17.)

And further be it noted, that the said criminal information filed by the United States Attorney showed petitioner had been convicted twice for violation of the narcotic laws, first, on the 29th day of November, 1926, and secondly, on the 9th day of January, 1935. (R. 18-22.)

Petitioner respectfully shows that the trial court totally ignored the mandate of the Circuit Court, did not sentence petitioner *in accordance with the opinion of the Circuit Court*, but did impose a judgment and sentence solely upon the criminal information filed by the United States Attorney under Section 2557(b)(5)(6)(7), otherwise known as an "Habitual Criminal Act." (R. 26.)

Notice of appeal under Rule III (5th Circuit Court) was duly given and filed on the 13th day of November, 1941 (R. 27), and the grounds of appeal therein set forth (R. 28). The Clerk's statement of docket entries under Rule IV was made up on November 15, 1941. (R. 29.) Appeal bond was granted in the sum of $5,000.00 and duly filed on the 9th day of December, 1941. (R. 31-33.) The assignment of errors was duly filed on the 18th day of November, 1941.

The cause in the United States Circuit Court of Appeals for the Fifth Circuit was styled: "Charles Beland versus United States of America," No. 10137.

The Fifth Circuit Court of Appeals based its affirmance of the judgment and sentence of the trial court on the criminal information under Sec. 2557, 26 U. S. C. A. substantially on the following grounds:

(1) That the trial court had the power and

authority to disregard sentencing petitioner *in accordance with the opinion of the Circuit Court.*

(2) That the trial court had the authority and power to sentence petitioner under Section 2557, 26 U.S.C.A.

(3) That the information filed under the provisions of Section 2557, 26 U.S.C.A., and the procedure thereon, was not violative of the Fifth Amendment to the Constitution of the United States.

(4) That petitioner's contentions are without merit insofar as relying upon the ex post facto guaranties under Article 1, Section 9, Clause 3, of the Constitution.

(5) And that "*the statute before us provides for none but future crimes*" and is not *ex post facto* in its operation.

The decision of the Circuit Court of Appeals for the Fifth Circuit was rendered on June 11, 1942. A petition for rehearing was duly filed on June ....., 1942, and an order denying the petition for rehearing was entered by the Circuit Court on or about August 27, 1942. Motion for stay of mandate was duly filed by petitioner, and several days thereafter petitioner's counsel died. Mandate was stayed by order of the Circuit Court from August 27th, 1942, to September 26th, 1942. On September 19th, 1942, petitioner applied to the Circuit Court for an extension of the stay of mandate beyond September 26th, 1942, to permit petitioner to complete this petition and supporting brief by his own efforts, and under the outline set by his recently deceased counsel.

The specification of errors and points relied upon

in the appeal from the Trial Court to the Fifth Circuit Court of Appeals, and herein involved, are as follows:

1.

That the judgment and sentence of the Trial Court herein was and is contrary to law.

2.

That the judgment and sentence of the Trial Court herein was and is contrary to the opinion, and mandate of the United States Circuit Court of Appeals for the Fifth Circuit herein, and said judgment and sentence of the Court did not follow the direction and judgment of said Circuit Court of Appeals.

3.

That the trial court was without jurisdiction to sentence the defendant, in that the mandate from the Supreme Court of the United States has not been issued or filed with the Clerk of this Court.

4.

That the sentence of seven years imprisonment on the charge on which the defendant was convicted, i.e., conspiracy, was and is violative of the laws of and Constitution of the United States and the amendments thereto.

5.

That the sentence imposed was further violative of the constitutional rights of the defendant in that the sentence imposed for the offense involved "was and is an unusual and cruel punishment."

II.

Reasons Relied on for Allowance of the Writ

(1) The decision of the Circuit Court of Appeals herein involves a fundamental question of Federal law, and is an erroneous decision on such an important question of constitutional law, and in conflict with the weight of authority.

(2) The decision of the Circuit Court of Appeals herein involves an important question of Federal Criminal procedure.

(3) The decision of the Circuit Court of Appeals herein is a decision of a Federal question under the Constitution and Statutes of the United States, violative of the constitutional rights of petitioner.

(4) The decision of the Circuit Court of Appeals is a decision in direct conflict with the provisions of the Constitution, under Article 1, Section 9, Clause 3, and the Fifth and Eighth Amendmends thereto.

(5) The decision of the Circuit Court of Appeals herein involves an important question of Federal law, both adjective and substantive, which has not been settled, but should be settled by this Honorable Court.

(6) The decision of the Circuit Court of Appeals herein involves the constitutionality of a so-called "Habitual Criminal Act" under Section 2557, 26 U. S. C. A. which has never before been settled by this Honorable Court, but should be settled by this Honorable Court.

(7) The decision of the Circuit Court of Appeals herein involves legislation discriminatory

in essence and character, and legislation denounced in previous decisions by this Honorable Court.

(8) The decision of the Circuit Court of Appeals is contrary to the Constitution of the United States, and the laws thereunder, and applicable decisions of this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit had in the Case numbered and entitled on its docket No. 10137, "Charles Beland v. United States of America, to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the said United States District Court for the Fort Worth Division of the Northern District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment and sentence under the criminal information based on Section 2557, 26 U. S. C. A., on which petitioner was convicted and sentenced, be reversed by this Court and that said petitioner be granted such other and further relief as to this Court may seem proper.

Dated this 21st day of September, 1942.

CHARLES BELAND,
Petitioner Pro Se.

CERTIFICATE OF COUNSEL

I hereby certify that I have carefully examined the record and, in the light of its contents, consider the petition for writ of certiorari well founded, and that it is not interposed for purpose of delay.

CHARLES BELAND,
Petitioner Pro Se.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

CHARLES BELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief of Petitioner in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit herein was rendered on the 11th day of June, 1942, and is set forth in the record at pages ——. (We do not understand that the same has as yet been officially reported.)

II.

Jurisdiction

(1) The judgment of the Circuit Court of Appeals for the Fifth Circuit, sought to be reviewed herein, is dated and was entered on the 11th day of June, 1942.

Petition for a rehearing was duly filed in said Circuit Court of Appeals and the same denied on August —, 1942.

(2) The statutory provisions which sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Section 347, Title 28 USCA.

(3) The cases and authorities which sustain said jurisdiction among others, are as follows:

Patton v. United States, 281 U. S. 276;
United States v. Gulf Refining Co., 268 U. S. 542;
United States v. Young, 232 U. S. 155.

(4) The decision of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment and sentence of the trial court and its disregard of the mandate of the Circuit Court in Case No. 9601, and the judgment and sentence thereafter of petitioner on allegations set out in a "criminal information" filed by the United States Attorney, and that the said procedure was lawful, and that the said statute was constitutional, and that the punishment imposed *was not ex post facto in its operation*, nor cruel and unusual punishment, was a decision by the Circuit Court of Appeals for the Fifth Circuit contrary to the weight of authorities, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, contrary to the Eighth Amendment of the Constitution of the United States, contrary to Article 1, Section 9, clause 3 of the Constitution of the United States, and applicable decisions of other courts of ap-

pellate jurisdiction and applicable decisions of this Honorable Court; and said decision by the Circuit Court of Appeals for the Fifth Circuit is such an erroneous decision as to bring this case within the jurisdictional provisions relied upon herein; and for the further reason that the statute involved is discriminatory legislation and has never before been *determined as constitutional* by this Honorable Court, and if not settled now by this Honorable Court may cause irreparable harm and injury to other citizens of the United States if charged under this so-called "Harrison Anti-Narcotic Habitual Criminal Act," Section 2557, (b), (6), (7), Title 26 USCA.

III.

Statement of the Case

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this brief.

Petitioner respectfully shows that on November 7th, 1941, he voluntarily surrendered to the United States Marshal for the Northern District of Texas, at Fort Worth, for the purpose of being sentenced *in accordance with the opinion* of the Circuit Court of Appeals for the Fifth Circuit in Case No. 9601 (*Beland v. United States*, 117 Fed. (2d) 958, cert. denied 313 U. S. 585), and the mandate issued by the said Circuit Court.

The record shows that three days after petitioner had voluntarily surrendered to the United States Marshal, and, to-wit, on the 10th day of November, 1941, *but before imposition of sentence by the trial court in accordance with the opinion of the Circuit Court and mandate*, and, *for the first time*, the United States Attorney for the Northern District of Texas filed what was termed a "criminal information" against petitioner under Section 2557, Title 26 USCA, setting forth that on two previous occasions petitioner had been convicted of unlawfully selling morphine, a derivative of opium, in violation of the laws of the United States. (R. 18-22.)

Petitioner further shows that the two previous convictions complained of in the said information filed under Section 2557, (b) (7) occurred in 1926 and 1935, *prior* to the enactment of the statute herein involved, namely, February 10th, 1939.

On November 11th, 1941, petitioner came into court, was fully apprised of the allegations set out in the information filed against him, acknowledged he was the person named, and that he had been previously convicted as alleged. The record shows a stipulation as to the facts, agreed to by and between counsel for the petitioner and the United States Attorney. (R. 16-17.) The trial court thereupon proceeded to impose a sentence of seven years imprisonment in a penitentiary, said sentence being imposed *solely* upon the allegations set out in the information and under the provisions of the statute here challenged, and was not a sentence imposed *in accordance with the opinion of the Circuit Court.* (R. 24-26.)

In its decision of June 11th, 1942, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment and sentence of seven years, and by its approval of the trial court's procedure inferentially upheld the said trial court's disregard of the Circuit Court's mandate; and further, the Circuit Court approved the challenged statute, and held that the sentence imposed by the trial court *was not ex post facto.*

This cause covers the question of procedure followed by the trial court in its disregard of the Circuit Court's mandate, and covers *for the first time* before this Honorable Court, so far as we have been able to determine from a careful search of all the authorities, the constitutionality of the statute involved herein.

IV.

Specification of Errors

(1) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the District Court for the Northern District of Texas had the power, authority, and jurisdiction to impose a seven years sentence without complying with the mandate issued by the Circuit Court in Case No. 9601, Beland v. United States, 117 Fed. (2d) 958, cert. denied 313 U. S. 585.

(2) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment and sentence of the District Court was lawful and constitutional.

(3) The Circuit Court of Appeals for the Fifth Cir-

cuit erred in holding that the judgment and sentence imposed by the District Court upon an information was not violative of the laws and the Constitution of the United States and the amendments thereto.

(4) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment and sentence imposed by the District Court was not ex post facto, and that the statute involved was constitutional.

(5) The Circuit Court of Appeals for the Fifth Circuit erred in denying the petition for a rehearing.

(6) The Circuit Court of Appeals for the Fifth Circuit erred for other errors appearing in the record.

—o—

Point A

(Specification of Errors Nos. 1, 2, 3, and 4)

The Circuit Court of Appeals for the Fifth Circuit erred in approving the trial court's action in disregarding the Circuit Court's mandate and assuming jurisdiction and authority to adjudge and impose a seven years sentence upon petitioner on allegations filed in an information, and that the information filed was not violative of petitioner's constitutional rights, and that the statute was lawful and constitutional, and that the punishment imposed was not ex post facto.

—o—

Questions Presented

The questions presented here for determination are: (a) Whether or not a District Court has the power and authority to disregard the mandate of the Circuit Court and proceed to substitute for such mandate a "criminal information" as the cause to be heard, tried, and judgment thereon pronounced; and, (b) whether or not such a proceeding, bottomed upon said "criminal information" is Due Process under the Fifth Amendment to the Constitution of the United States; and, (c) whether or not the statute involved (Section 2557, Title 26 USCA) under which the said information was filed is constitutional; and, (d) if held to be constitutional by this Honorable Court, whether or not the seven years sentence imposed by the trial court was ex post facto.

The statute herein involved, Section 2557, (b) (6) (7) Title 26 USCA (53 Stat. 274) was enacted February 10th, 1939, and embraced on that date in the Internal Revenue Code, and provides as follows:

> "(6) A person who, after having been two times convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, cocoa leaves, cocaine, or any salt, derivative, or preparation of opium, cocoa leaves, or cocaine, again sells, imports, or exports or conspires to sell, import, or export, any of the said narcotic drugs, in violation of the laws of the United States, shall, upon conviction of such third offense, or any offense subsequent thereto, be fined not more than $10,000 or imprisoned in a Federal penitentiary for not more than twenty years, or both, in the

discretion of the Court, whenever the fact of such previous convictions is established in the manner prescribed in paragraph 7 of this subsection."

"(7) Whenever it shall appear, after conviction and before or after sentence, that a person convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of the narcotic drugs enumerated in paragraph 5 has previously been convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import or export, any of said narcotic drugs, in violation of the laws of the United States, it shall be the duty of the United States District Attorney for the district in which such subsequent conviction was had to file an information alleging that the defendant has previously been so convicted, and further alleging the number of such previous convictions. The Court in which the defendant was convicted shall cause the said defendant, whether confined in prison or otherwise, to appear before it and shall apprise him of the allegations of the information and of his right to a trial by jury as to the truth thereof. The Court shall inquire of the defendant whether he is the person who has previously been convicted. If the defendant states he is not such person, or if he refuses to answer or remain silent, a plea of not guilty shall be entered by the Court, and a jury shall be impanelled to determine whether the defendant is the person alleged in the information to have previously been convicted, and the number of such previous convictions. If after a trial on the sole issue of the truth of such allegations the jury determines that the defendant is in fact the person previously convicted as charged in the information, or if he

> acknowledges in open court, after being duly cautioned as to his rights, that he is such person, he shall be punished as prescribed in paragraphs 5 or 6 of this subsection, as the case may be, and the previous sentence of the Court, if any, shall be vacated and there shall be deducted from the new sentence the amount of time actually served under the sentence so vacated."

Petitioner respectfully shows that on November 7th, 1941, he voluntarily surrendered to the Marshal for the purpose of being brought before the original trial court for resentence *in accordance with the opinion* and the mandate of the Circuit Court, and that such resentence involved a conspiracy charge which had theretofore been affirmed by the said Circuit Court. Under the Circuit Court's opinion and mandate, the trial court was bound to put into force and effect, or rather, to impose a sentence upon a conspiracy charge (the 42nd count in the indictment in Case No. 9601). It is contended by petitioner that the trial court's jurisdiction over him extended *only* for the purpose of pronouncing a sentence *in accordance with the opinion of the Circuit Court*, and, that by the very nature of things, the trial court's jurisdiction was limited to that special judicial function, and nothing more.

We are here concerned with what occurred during the four days commencing with petitioner surrendering himself to the jurisdiction of the court in the Northern District of Texas, which ended on November 11th, 1941, with the petitioner sentenced under altogether different proceedings than that directed by the Circuit Court in its mandate. Three days after peti-

tioner had surrendered, and more particularly on the 10th day of November, 1941, a "criminal information" was filed against him by the United States Attorney, drawn under the so-called Harrison Anti-Narcotic Habitual Criminal law, Section 2557, Title 26 USCA, setting forth that he had been convicted of violations of the narcotic laws of the United States twice prior to the affirmed conspiracy judgment in Case No. 9601, and citing therein the information that the two previous convictions occurred first, on November 29th, 1926, and secondly, on January 9, 1935.

Petitioner respectfully calls the attention of this Honorable Court to the dates of the admitted *prior convictions*, for we shall advert to the same later herein.

No judicial action on the part of the trial court took place on November 7th, 8th, 9th, and 10th, 1941, in regard to the Circuit Court's mandate. And, on November 11th, 1941, the fourth day after petitioner's voluntary surrender to custody, instead of carrying out the mandate of the Circuit Court, the trial court proceeded to hear the allegations set out in the "criminal information" and your petitioner found himself sentenced to seven years imprisonment in a penitentiary because a law, passed long after he had served his sentences in 1926 and 1935 provided, so the trial court and the Circuit Court held, that petitioner be further punished by an *augmented sentence* for having previously been convicted of conspiracy *after the passage of the law* here challenged.

Petitioner respectfully submits that this procedure followed by the trial court in disregarding the man-

date of the Circuit Court does violence to the orderly administration of justice. In petitioner's former brief for certiorari before this Honorable Court, 313 U. S. 585, we said: "*The nub of legality in any cause is that form of procedure which in no wise infringes on the rights of the parties.*" And, we quoted Justice Reed's remarks in *Edwards v. United States*, 61 S. Ct. 673, wherein the learned Justice said, speaking for the Court: "*Procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body.*"

Petitioner concedes that the action of the trial court in disregarding the Circuit Court's mandate may not be the controlling question here, but it is believed important and deserving of this Honorable Court's scrutiny, touching as it does on orderly Federal Criminal procedure. We have no way of knowing what happened to the Circuit Court's mandate after the trial court sentenced petitioner to a penitentiary term of seven years on the allegations set out in the "criminal information."

Turning to the constitutional rights of petitioner under the Due Process Clause of the Fifth Amendment to the Constitution of the United States, petitioner contends that the information filed by the United States Attorney was not a presentment or an indictment of a Grand Jury. The Fifth Amendment provides that: "*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.*"

This "criminal information" was not filed, or pre-

sented to the trial court at the time of the original trial, but it was filed one day *prior* to the date when petitioner was to have been resentenced *in accordance with the opinion* of the Circuit Court, namely, November 10th, 1941.

Nor was this "criminal information" pleaded in petitioner's indictment at the time of his arraignment before the trial court.

Careful examination of the information, shows that the convictions set forth therein occurred *long before* the enactment of the statute, in 1926 and 1935. The statute was enacted on February 10th, 1939, as the Circuit Court recites in its opinion; although before reciting this February 10th, 1939, date, the Circuit Court opinion states: " * * * the statute providing for increased punishment for habitual narcotic violators was approved August 12th, 1937." Even were the date of "approval of the statute" binding, the fact remains petitioner's prior convictions occurred in 1926 and 1935, something more than two and one half years elapsing from the date of the last (or second) conviction) to the date when the legislation was approved—and an even longer period elapsing before the statute was enacted into the Internal Revenue Code, February 10th, 1939.

Petitioner respectfully contends that by the terms of the statute punishment is arbitrarily set greater than a year, and in a penitentiary, and therefore, "allegations" in an information filed under said statute take on the character of "offenses" charged under other criminal statutes and by that token must be

construed as an "infamous crime." The Fifth Amendment provides that "infamous crimes" must be charged only by presentment or an indictment of a Grand Jury. Can it reasonably be held that the statute, and the information filed thereunder meets this constitutional requirement? We think not. On the subject of infamous crimes, we respectfully refer this Honorable Court to *Falconi v. United States*, 280 Fed. 766, and the cases therein cited and collated.

For the foregoing reasons, petitioner submits that Due Process did not inure to him when he was brought before the trial court to answer the allegations set out in the "criminal information"; and that the information filed against him was violative of his rights under the Fifth Amendment, i.e., that one cannot be held to answer to serve a prison sentence unless by presentment or indictment of a Grand Jury.

Furthermore, petitioner contends that the punishment imposed, pursuant to the provisions of the statute involved herein, constituted a cruel and unusual form of punishment contrary to the Eighth Amendment to the Constitution of the United States, and was tantamount to *double jeopardy*.

Petitioner respectfully submits that the statute herein involved blatantly carries the stamp of unconstitutionality. By its terms, it supersedes a guaranty laid down in the Fifth Amendment to the Constitution of the United States. By its terms, it augments the punishment theretofore visited upon *a particular class of offenders*, narcotic law violators, and by its terms it

attempts to operate both retroactively and prospectively, unless stricken down by this Honorable Court.

Another important constitutional question arises, dealing with Article 1, Section 9, clause 3 of the Constitution of the United States, which provides: "*No Bill of Attainder or ex post facto law shall be passed.*" If the language used by the Congress in this statute is to be construed as affecting offenses *prior* to the enactment of the statute, which the Circuit Court held that the statute did, we then contend that the same is patently unconstitutional on its face because it operates retroactively and is an ex post facto law. Chief Justice Marshall held, in *Fletcher v. Peck*, 6 Cranch, (U. S.) 87, 138, 3 L. Ed. 162: "An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed." A very clear definition of ex post facto laws is found in 12 *Corpus Juris*, 1097, 1098, where it is defined as follows: "An ex post facto law is one which imposes punishment for an act which was not punishable when it was committed, *imposes additional punishment*, or changes the rules of evidence, by which *less or different testimony is sufficient to convict.* It is essential to an ex post facto law, therefore, that it relate to criminal matters, *that it be retroactive in its operation* and that it alter the situation of the accused party to his disadvantage." *Burgess v. Salmon*, 97 U. S. 587, 24 L. Ed. 1104; *Duncan v. Missouri*, 152 U. S. 382, 14 S. Ct. 570, 38 L. Ed. 485; *Thompson v. Utah*, 170 U. S. 343, 18 S. Ct. 620; *United States v. Hall*, 2 Wash. 366. (Italics in definition ours.)

Granting the premise that in determining whether a

law is ex post facto or not, the facts in the individual case must be considered, petitioner urges this Honorable Court to consider the main fact that he had been convicted twice *prior to the enactment of the statute*, had paid the penalty imposed upon him, and that the "criminal information" filed against him did not allege that *after* the passage of the statute, he had previously been convicted twice for narcotic law violations.

In its decision, the Circuit Court adopted a unique line of reasoning to uphold the constitutionality of the statute as to its not being ex post facto in its operation by claiming an exemption in the instant case revolving around the date when the legislation was "approved," and when it was enacted into the Internal Revenue Code, as covering the inception and the conclusion of the conspiracy charged in the 42nd count of the indictment. As to this, we have shown herein that regardless of this opinion by the Circuit Court, the fact nevertheless remains that petitioner was charged in the "criminal information" with having previously been convicted twice for narcotic law violations and that said convictions occurred *long before the passage of the act.*

Petitioner respectfully submits that the Circuit erroneously approved the statute and its intentions by declaring that "the statute before us provides for none but future crimes," and yet we find here a set of allegations reaching out to ensnare petitioner covering acts committed long before the statute was "approved" and enacted into the Internal Revenue Code.

We concede that the language in the statute, "previously been convicted" is a broad statement, susceptible of interpretations that might lead to the conclusion that Congress intended all prior convictions of narcotic law violators, prior to the enactment of this law, would be included thereunder.

However, a careful search of the authorities, and what information is available as to the history of this legislation fails to produce any evidence that Congress intended this challenged statute to operate retroactively. Certainly the Circuit Court would have so pointed out in its opinion, had there been some evidence to show such an intention by the Congress. In the absence of such evidence, and following the general rule of criminal law covering ex post facto laws, it is safe to hold that the challenged statute here was intended to cover subject matter *after* its enactment, and not subject matter *prior* to its enactment. Thus, if for any reason this Honorable Court should hold the statute constitutional, basing its decision on former decisions affecting habitual criminal laws in the states of Massachusetts and West Virginia, we respectfully urge this Court not to overlook the special facts attendant herein where the allegations in the information dealt with previous convictions *prior* to the passage of this challenged section, and that the penalty imposed was therefore ex post facto.

———o———

Point B

(Specification of Errors Nos. 5, and 6)

The Circuit Court of Appeals for the Fifth Circuit erred in denying petitioner's petition for a rehearing, said petition being predicated on the Skinner v. Oklahoma sterilization case, and for other errors appearing in the record.

Petitioner respectfully shows that on June 1, 1942, this Court decided the *Skinner v. Oklahoma Case*, No. 782, October term, 1941. The reports did not carry this Court's decision until several days later, and petitioner's late counsel was unable to present argument in this case to the Circuit Court relying on the Skinner case. On June 11, 1942, the Circuit Court rendered its opinion in the instant case, and, in a petition for rehearing, the petitioner's counsel embodied this Honorable Court's decision in the Skinner case as grounds for a rehearing, which subsequently was formally denied by the Circuit Court without any comment.

The Skinner case, which we refer to and rely upon, in our opinion is strictly in point for several reasons. The main reason covers the facts that a special class of offenses was punishable, under the Oklahoma law, by vasectomy (if the offender was a male), and those persons guilty of the prohibitory laws, political offenses, revenue laws, and embezzlement, were exempt from the punishment thereunder said sterilization law. A thrice convicted chicken thief stood before the Oklahoma courts specially condemned. A thrice convicted embezzler bore no such ignominy.

In the present situation, narcotic law violators are singled out by statute as a special class, and if twice or thrice convicted, special aggravated punishment is imposed in an arbitrary and mandatory fashion. The embezzler under the Federal Criminal Code is not within the scope of being so condemned; nor is the counterfeiter, the violator of the Dyer Act, nor the mail robber so condemned. Why this discriminatory statute (Section 2557, 26 USCA)?

Petitioner respectfully submits that the principles involved in the Skinner case which moved this Honorable Court to strike down that Oklahoma sterilization law, are similarly involved herein, and should move this Court to strike down this challenged section.

Conclusion

We respectfully submit that by all the tests, this challenged statute fails to meet the standards of constitutionality. The filing of the information was violative of the Due Process Clause; the "allegations" in said information were ex post facto subject matter; the judgment and sentence imposed was not only ex post facto, but cruel and unusual punishment violative of the Eighth Amendment to the Constitution; and the entire proceeding violated petitioner's rights under Article 1, Section 9, clause 3.

And further, the statute under challenge here, branding a special class of offender, discriminatory on

its face, should be declared unconstitutional as was the statute involved in the Skinner v. Oklahoma case.

Wherefore, we respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case was and is in conflict with the decisions of other courts of appellate jurisdiction, and an applicable decision of this Honorable Court; that the decision by the Circuit Court involves important constitutional questions never before settled by this Honorable Court where this particular "habitual criminal law" is involved, and that the same merits this Honorable Court's consideration to the end that the writ of certiorari prayed for herein be granted, and that after reviewing the record and the decision of the Circuit Court that said decision be reversed and this petitioner granted such relief as in the premises seem meet and just.

Respectfully submitted,

CHARLES BELAND,
Petitioner Pro Se.

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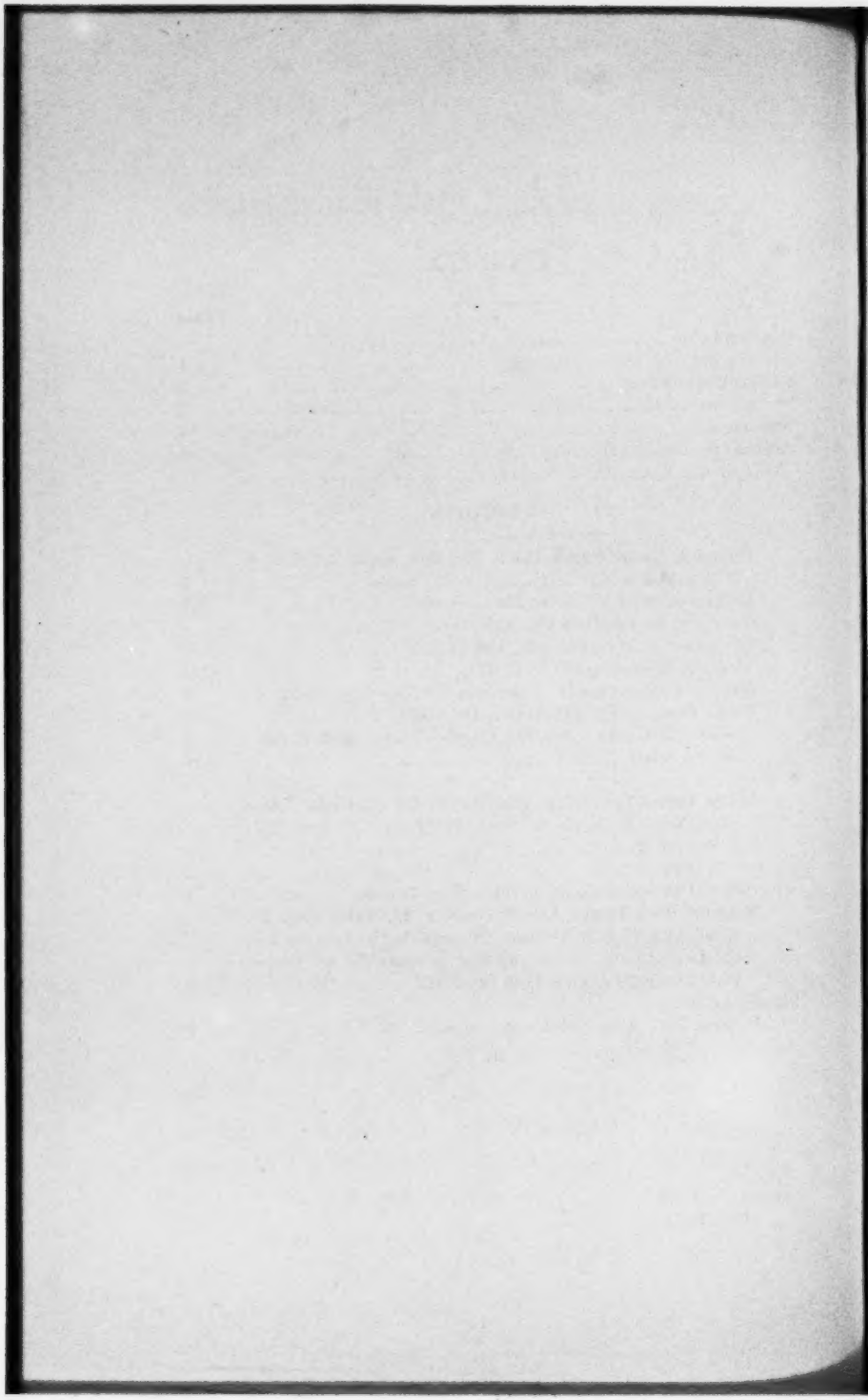

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 416

CHARLES BELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 36–39) is reported at 128 F. (2d) 795.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1942 (R. 40), and a petition for rehearing (R. 41–57) was denied August 27, 1942 (R. 58). The petition for a writ of certiorari was filed September 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the district court's action in imposing a seven-year sentence, pursuant to Section 2 of the Act of August 12, 1937, violated the mandate of the circuit court of appeals in remanding the cause for the purpose of resentencing petitioner.

2. Whether Section 2 of the Act of August 12, 1937, providing a more severe punishment for a person convicted for a third time of violating the federal narcotic laws, operates as an *ex post facto* law when applied to one whose two prior convictions occurred before the enactment of the statute.

3. Whether the statute is unconstitutional because of the fact that it applies only to habitual offenders against the narcotic laws.

STATUTE INVOLVED

Sections 2 and 3 of the Act of August 12, 1937, c. 598, 50 Stat. 627 (Internal Revenue Code, Title 26, U. S. C., § 2557 (b) (6) and (7)) provide:

> SEC. 2. A person who, after having been two times convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine, again sells, imports, or exports or conspires to sell, import, or export, any of the said narcotic drugs, in violation of the laws of the United States, shall, upon conviction of such third offense, or any offense subsequent thereto, be fined not more than $10,000 or imprisoned in a

Federal penitentiary for not more than twenty years, or both, in the discretion of the court, whenever the fact of such previous convictions is established in the manner prescribed in section 3 of this Act.

SEC. 3. Whenever it shall appear, after conviction and before or after sentence, that a person convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of the narcotic drugs enumerated in this Act has previously been convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of said narcotic drugs, in violation of the laws of the United States, it shall be the duty of the United States district attorney for the district in which such subsequent conviction was had to file an information alleging that the defendant has previously been so convicted, and further alleging the number of such previous convictions. The court in which the defendant was convicted shall cause the said defendant, whether confined in prison or otherwise, to appear before it and shall apprise him of the allegations of the information and of his right to a trial by jury as to the truth thereof. The court shall inquire of the defendant whether he is the person who has previously been convicted. If the defendant states he is not such person, or if he refuses to answer or remains silent, a plea of not guilty shall be entered by the court, and a jury shall be

empaneled to determine whether the defendant is the person alleged in the information to have previously been convicted, and the number of such previous convictions. If after a trial on the sole issue of the truth of such allegations the jury determines that the defendant is in fact the person previously convicted as charged in the information, or if he acknowledges in open court, after being duly cautioned as to his rights, that he is such person, he shall be punished as prescribed in sections 1 or 2 of this Act, as the case may be, and the previous sentence of the court, if any, shall be vacated and there shall be deducted from the new sentence the amount of time actually served under the sentence so vacated.

STATEMENT

On May 14, 1940, an indictment was returned in the District Court for the Northern District of Texas charging petitioner and others, in 41 counts, with substantive offenses against the narcotic laws of the United States and, in the forty-second count, with conspiracy to violate such laws (R. 1–15, 16). Petitioner was found guilty on counts 16, 18, and 42 and received a general sentence of five years' imprisonment on counts 16 and 42 and a ten-year suspended sentence on count 18 (R. 16). On appeal, the court below affirmed the conviction on count 42, the conspiracy count, but reversed the judgment as to counts 16 and 18 (R. 16–17, 22–23; see *Beland* v. *United States,* 117 F. (2d) 958,

certiorari denied, 313 U. S. 585), and remanded the cause to the district court "with direction to resentence him [petitioner] accordingly" (R. 23).[1]

On November 10, 1941, prior to the imposition of sentence in accordance with the mandate of the circuit court of appeals, the United States Attorney filed an information in the district court, pursuant to the provisions of Section 3 of the Act of August 12, 1937 (*supra*, p. 3), alleging that petitioner had been convicted in the same district in 1926 and again in 1935 of selling morphine, a derivative of opium, in violation of the narcotic laws of the United States (R. 17, 18–22). On November 11, 1941, after having been fully apprised of these allegations and of his right to a jury trial as to the truth thereof, petitioner acknowledged in open court that he was the person who had been twice previously convicted as alleged in the information (R. 25). The court thereupon sentenced petitioner to seven years' imprisonment (R. 26), and on appeal the judgment was affirmed (R. 40).

ARGUMENT

1. Petitioner's contention (Pet. 6; Br. 5, 9–11) that the action of the district court in imposing a seven-year sentence violated the mandate of the circuit court of appeals is without merit. The sentence was less than the maximum allowed by

[1] The circuit court of appeals held that the convictions on the substantive counts—16 and 18—were not supported by the evidence (117 F. (2d), at 959).

Section 2 of the Act of August 12, 1937 (*supra*, pp. 2–3), which, under the facts alleged in the information and admitted by petitioner, was applicable. And, as pointed out by the court below, no opinion was expressed by it on the previous appeal as to the length of sentence to be imposed by the district court; hence, all that was required under the mandate was that petitioner be resentenced "in accordance with the Constitution and laws of the United States" (R. 38; see also R. 23.) [2]

2. Petitioner argues, however (Pet. 7; Br. 6, 14–15), that Section 2 of the Act of August 12, 1937, if construed to apply to a third conviction under the narcotic laws where the prior convictions occurred before the passage of the act, is an *ex post facto* law and hence violative of Article I, Section 9, clause 3 of the Constitution.[3] This contention is likewise without merit. The constitutionality of statutes imposing heavier penalties

[2] The fact that petitioner's contention did not impress the very court whose mandate is alleged to have been violated (see R. 37–38) would seem to render any further discussion of the point superfluous.

[3] Petitioner suggests (Br. 16) that Congress may have intended the act to apply only where the prior convictions occurred subsequent to the passage of the act. The suggestion, however, is based largely on the contention, which we here show to be untenable, that, unless the act is thus construed, it is *ex post facto* in nature. But in any event, the plain and unambiguous language of the act does not admit of the suggested construction.

upon persons who have been previously convicted of crime is settled. *Graham* v. *West Virginia,* 224 U. S. 616[4]; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Moore* v. *Missouri,* 159 U. S. 673. Under such statutes, habitual offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham* v. *West Virginia, supra,* at 623. And since these statutes impose punishment on "none but future crimes," they are not *ex post facto. McDonald* v. *Massachusetts, supra,* at 313. In the instant case, the third conviction was based upon an offense—the conspiracy charged in count 42 of the indictment—which occurred after the enactment of the statute (see R. 2)[5]; as a consequence of the two prior convictions, Section 2 was in terms applicable and petitioner was subject to

[4] The federal statute here involved is almost identical in its provisions with the West Virginia statute, the constitutionality of which was sustained in the *Graham* case, *supra.*

[5] Petitioner erroneously states (Br. 4, 7, 12), as he did in the court below (see R. 39), that the statute was enacted on February 10, 1939 (the conspiracy was alleged to have been formed on or about November 24, 1937, and to have continued down to May 14, 1940, the date the indictment was filed (R. 2)). However, the statute was in fact approved on August 12, 1937 (50 Stat. 627). The date February 10, 1939, which petitioner cites, is the date of the enactment of the Internal Revenue Code (53 Stat., Part 1, p. 1), which incorporated the provisions of the Act of August 12, 1937, as Section 2557 (b) (5), (6), and (7) (53 Stat., Part 1, pp. 275–276).

be punished for the third offense in accordance with its provisions. The fact that the earlier convictions occurred prior to the enactment of the statute is wholly immaterial, for, as we have seen, the punishment is for the new crime only, but is heavier because the accused is an habitual offender. *Ross's Case,* 2 Pick. (19 Mass.) 165, 170–171 (1824); *Rand* v. *Commonwealth,* 9 Grattan (50 Va.) 738, 743–745 (1852); *Ex Parte Gutierrez,* 45 Cal. 429, 431–433 (1873).[6]

[6] The contention (Br. 5–6, 7, 11, 12–13) that Section 3, *supra*, in so far as it authorizes the United States Attorney to proceed by way of information, violates the clause of the Fifth Amendment providing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is likewise untenable. As this Court held in the *Graham* case, *supra*, the information does "not allege crime" and the defendant is "not held to answer for an offense" (224 U. S., at 624); "There is no occasion for an indictment", because "the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction" (*id.*, at 627). Nor was it necessary, contrary to petitioner's implied assertion (Br. 11–12), that the prior convictions be alleged in the indictment, whether or not they were known at the time. *Graham* v. *West Virginia*, *supra*, at 628–629. Indeed, such a procedure would not have been permissible under the statute, which requires that the fact of the previous convictions be established "after conviction and before or after sentence" (Section 3, *supra*, p. 3). The further contentions that the sentence imposed was a cruel and unusual form of punishment (Pet. 6; Br. 2, 18) and that it was "tantamount to double jeopardy" (Br. 13) are also without merit. *Moore* v. *Missouri*, *supra*, at 677; *McDonald* v. *Massachusetts*, *supra*, at 313; *Graham* v. *West Virginia*, *supra*, at 631.

3. Relying on this Court's decision in *Skinner* v. *Oklahoma*,[7] No. 782, October Term, 1941, decided June 1, 1942, petitioner urges (Br. 17–18) that the statute here involved is unconstitutional because "narcotic law violators are singled out * * * as a special class, and if twice or thrice convicted, special aggravated punishment is imposed in an arbitrary and mandatory fashion" (*id.*, 18).[8] The contention lacks merit, for the *Skinner* case is clearly distinguishable. The Oklahoma habitual criminal sterilization law there involved was held to violate the equal protection clause of the Fourteenth Amendment because of its highly artificial and arbitrary discrimination between different types of habitual criminals. It is clear, however, from the report of the House Judiciary Committee recommending enactment of the statute here involved that there was a special and urgent need for legislation increasing the punishment of habitual violators of the narcotic laws. H. Rep. No. 1122, 75th Cong., 1st sess., pp.

[7] The texts of the majority and the two concurring opinions are copied in the petition for a rehearing filed in the court below (R. 43–56).

[8] This statute is not the first providing for increased punishment of habitual offenders against specific federal laws. Cf. Section 29 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 316, repealed by Section 1 of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, Title I, 49 Stat. 872. The repealed section provided for increased penalties for second or subsequent offenses against the liquor laws. So far as we have been able to determine, the constitutionality of this section was never questioned. See annotations under 27 U. S. C. A. 46.

2–3.[9] There is, of course, no constitutional mandate compelling Congress, in enacting penal legislation, "to ignore experience which marks a class of offenders or a family of offenses for special treatment." *Skinner* v. *Oklahoma, supra* (R. 49).[10]

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[9] The necessity for the legislation is shown by the following excerpts from the committee's report:

"Studies of the problem of narcotic control made by the Treasury Department indicate the need for this legislation. Those studies show that a large percentage of persons convicted for narcotic violations are habitual offenders. * * *

"The studies by the Treasury Department further indicate that narcotic offenders as a group are responsible for a large number of criminal offenses of every nature and have a high percentage of previous convictions for other crimes as well as those involving narcotics. * * *

"It is evident from the above facts that the habitual violator of the narcotic laws presents a very serious problem in the control of crime, and that existing methods of enforcement, so far as they concern the punishment meted out to such violators, has not been sufficiently drastic on the whole to check their activities. The present narcotic laws do not provide for the increase of the punishment of violators by reason of previous convictions. * * *

"It is believed that H. R. 6283, through its provisions for the increase of the punishment of habitual offenders against the narcotic laws, will not only deter the commission of offenses against such laws, but also by removing such offenders from contact with society will prevent the spread of the narcotic habit and reduce materially the number of criminal offenses of other kinds."

[10] Of course, the *Skinner* case is also distinguishable on the ground that the equal protection clause of the Fourteenth Amendment, there held to have been violated, has no counterpart in the Fifth Amendment, or any other constitutional provision limiting congressional action. Moreover, it appears both from the majority opinion (R. 49–51) and from the concurring opinions (R. 52–55, 56) that the devastating

CONCLUSION

The case was correctly decided below, and no conflict of decisions or question of importance is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1942.

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nature of the punishment imposed weighed heavily in this Court's judgment that the statute was not sufficiently meticulous in avoiding discrimination and unwarranted application.

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No. 416.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CHARLES BELAND,
Petitioner,

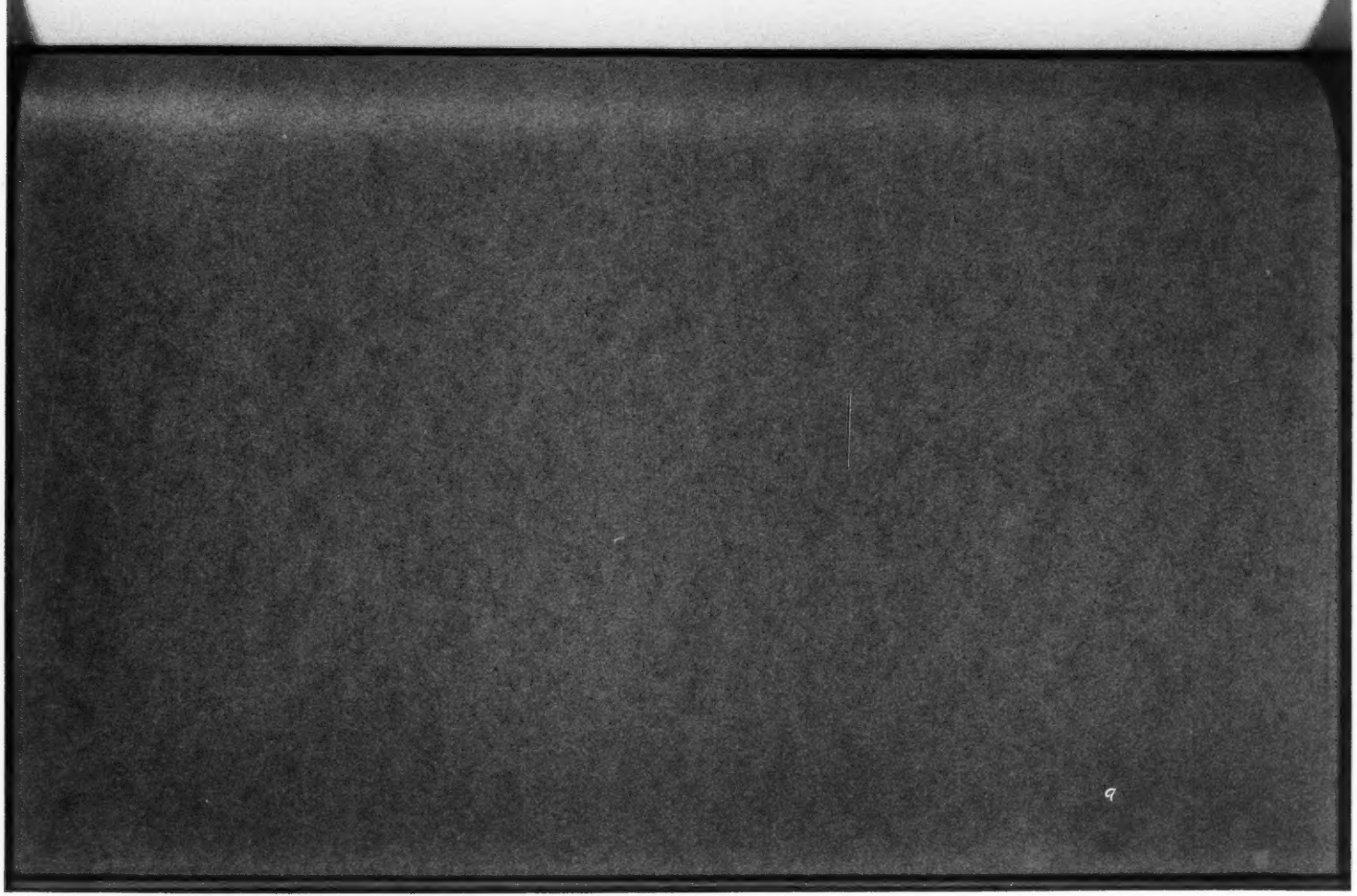
vs.

UNITED STATES OF AMERICA,
Respondent.

On Denial of a Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Petition For Rehearing

CHARLES BELAND,
Petitioner Pro Se.



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No. 416

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

CHARLES BELAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Denial of a Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Petition For Rehearing

May It Please This Honorable Court:

(1) Petitioner earnestly urges this Honorable Court to reconsider its decision denying the writ of certiorari prayed for, which denial of said writ was rendered November 9, 1942, and to set aside said order of denial by granting a re-hearing of the issues involved toward the end that the writ prayed for be granted for the reasons herein set forth, supported by the following authorities:

U. S. ex rel Umbenhowar v. McDonnell, 11 Fed. Supp. 1014;

12 *Corpus Juris*, page 1103;

Ex Parte Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835;

Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127;
Malloy v. South Carolina, 237 U. S. 180, 35 S. Ct. Rep. 507;
Smith v. Cockrill, 6 Wall. 756;
Beazell v. Ohio, 269 U. S. 167, 46 S. Ct. Rep. 68.

The authorities hereinbefore listed penetratingly and overwhelmingly hold to the contrary the government's contentions, that in the present case at bar, the judgment and sentence and the statute involved (Sections 2 and 3 of the Act of August 12, 1937, c. 598, 50 Stat. 627, Internal Revenue Code, Title 26, U. S. C., Section 2557 (b) (6) and (7)) are not ex post facto.

A case directly in point, supporting petitioner's contentions, is the Umbenhowar case, *supra*. There, Section 716b, Title 18 U. S. C. A., enacted June 29, 1932, was involved. The petitioner in that case committed an offense *five days prior* to the passage and effective date of Section 716b, known as the Conditional Release Law.

He was tried, convicted, and sentenced *several months after* the effective date of the said statute.

Subsequently, after Umbenhowar had served his sentence, minus the Good Time allowances for good conduct provided for under Section 710, Title 18, U. S. C. A., which statute had become subsidiary to, and partially inoperative because of Section 716b, the government sought to hold Umbenhowar as a prisoner conditionally released under the said Section 716b. Habeas corpus was sued for, granted, and upon full inquiry into the facts and laws involved, the relator was ordered discharged from custody.

In a well written opinion, the District Judge held that the statute was ex post facto as to the relator, and referring to the statute said: " * * * such legislation can only refer to subsequent crimes," and further, with approval quoted Justice Marshall's definition of ex post facto laws previously stated by petitioner in his original brief at page 14.

The District Judge re-emphasized the rule clearly stated in 12 Corpus Juris, page 1103: "A law which deprives an accused person of any *substantial right* or *immunity* possessed by him before its passage is ex post facto as to prior offenses." (Italics ours.) Citing cases.

All that was involved in the Umbenhowar case was the question whether the Good Time allowance earned by him under Section 710, for an offense committed before Section 716b was enacted, entitled the relator to complete freedom from parole supervision as provided by the said Section 716b, or whether he came within the terms of the statute latterly enacted merely because he was tried, convicted, and sentenced *after* that Conditional Release Law was passed. Be it noted here that the government did not prosecute an appeal from the District Judge's decision, contenting itself with the well established rule that the prior offense, that is, the fact that the offense was committed *prior* to the enactment of Section 716b did not rob the petitioner of those *immunities* or *substantial rights* as discussed by Judge Woodward.

But in the instant case, we find a different status created against this petitioner, and against those *substantial rights or immunities* possessed by him in

1926, and in 1935, when he was prosecuted for violations of the narcotic laws, which were *prior* to August 12, 1937, when the challenged statute herein involved was passed.

The two previous convictions of petitioner, as set out in the information filed against him November 10, 1941, occurring prior to the passage and effective date of Section 2557, Title 26, U. S. C. A., being an indispensable part of that information, makes of that information one which would be of no efficacy whatsoever were those allegations as to the *prior convictions* extrapolated. We shall advert to this later herein.

The government's contentions, citing *McDonald v. Massachusetts*, 180 U. S. 311, and *Graham v. West Virginia*, 224 U. S. 616 (brief for the United States, p. 7), that the third conviction for conspiracy justified the heavier penalty, and that such is the statute's plain implications affecting such third conviction, would be tenable, provided the two previous convictions were for offenses committed *after* the passage of the act here challenged.

But the government's position must be held as untenable when it seeks to bring within the act's penal provisions offenses committed long before the act went into effect.

We cannot here blend the rabbit and the wolf, for the criminal information filed against petitioner is woven entirely of subject matter occurring before the act was passed, and blended with a subsequent offense nowhere authorized by the Congress. H. Rep. No. 1122, 75th Cong., 1st Sess., pp. 2-3.

If it had been the Congress' intention to include within the scope of Section 2557, offenders of the narcotic laws *prior* to enactment of Section 2557, it is reasonable to believe the Congressional report would have carried some mention of that intention. Furthermore, had there been any question of the retroactive phases of the statute creating ex post facto situations, certainly the report would have carried some mention by the Attorney General acting in an advisory capacity to the House Judiciary Committee. We can find no such observations in the report.

We respectfully contend that what occurred in the instant case when the information was filed against petitioner not only robbed him of certain *substantial rights and immunities*, but that the statute was ex post facto as to him. It was well held, in *United States v. Hall*, 6 Cranch, 171:

> "A statute which, in relation to the *offense or its consequences*, alters the situation to one's disadvantage, is ex post facto and void." (Italics ours.) See *In Re Murphy*, 87 Fed. 549.

Petitioner respectfully submits that the facts herein indisputably show his situation was unlawfully and unconstitutionally altered, by the invocation of Section 2557, and the information filed thereunder alleging in substance those *prior* convictions which occurred *prior* to the effective date of the act.

Peculiarly, petitioner's case parallels the Umbenhowar case, yet is of a more aggravated nature in that the respondent relies upon this challenged statute to restrain petitioner under an augmented sentence, in

the face of Judge Woodward's decision that prior offenses, operative under less harsher pains and penalties, cannot be disregarded and greater punishment visited upon the prisoner.

Additionally, we disagree with the respondent's argument, on page 6 of respondent's brief, note 3 in the margin, wherein it is argued that the statute is not ex post facto in its terms or its implications because Congress' "plain and unambiguous language" in the act itself "does not admit of (petitioner's) suggested construction" that it is ex post facto.

In petitioner's original brief, it was contended that the act itself was and is susceptible of two interpretations. Does the language in the act definitely say that *previous convictions prior to* the enactment of the statute come within its purview or terms? The absence of such a definite provision in the act is plain from a reading of the same.

This very omission presents grave question as to the statute having retroactive force to the extent that it absorbed within its scope and orbit offenses occurring before the act was passed.

(2) As to the applicability of this Court's decision in the *Skinner v. Oklahoma* case, No. 782, October Term, 1941, what better proof can there be as to the discriminatory features of this legislation (Sec. 2557) in singling out narcotic law violators, than the House Rep. No. 1122, 75th Cong., 1st sess., pp. 2-3, recited by respondent at page 10 in its brief, in the margin space as note 9. Nothing in the report treats with violators of the Mann Act, violators of the Dyer Act,

counterfeiters, users of the mails in schemes to defraud, and violators of countless other Federal laws, in the Congress' efforts to control crime.

Since it is a well established rule that Courts will take judicial notice of the facts, the Department of Justice reports will show conclusively, and beyond a peradventure of doubt, that countless thousands of Federal prisoners (now confined) and those under Federal parole are recidivists, thrice convicted, and perhaps more times than that, of similar offenses under the Federal Code, and yet no Federal habitual criminal act covers those offenses.

Respondent admits that this Court declared the Oklahoma sterilization law in the Skinner case unconstitutional because it was discriminatory legislation. Respondent adds, however, that this Court was moved to strike down the Oklahoma law because of the "devastating nature of the punishment imposed," and that this factor "weighed heavily in this Court's judgment that the statute was not *sufficiently meticulous in avoiding discrimination and unwarranted application.*" (Italics ours.)

We are moved to observe that here again respondent waxes inconsistent, and attempting to make the rabbit and the wolf one; and too, to make the rabbit chase the wolf.

This Honorable Court struck down the Oklahoma law because it denied the citizens of that state the equal protection of the laws guaranteed by the Fourteenth Amendment. The procedure thereunder that law, which would result in vasectomy (if the offender

were a male) was a secondary consideration discussed by this Honorable Court. The line of demarcation between constitutionality and unconstitutionality of that statute concerned the special offenses exempt from prosecution. As to the "devastating nature" of the punishment, how more "devastating" can the nature of that punishment be construed as against hanging, execution by a firing squad (in Utah), or the lethal gas chambers in Nevada and Arizona, and execution by electrocution in New York and other states?

The "devastating nature" of punishment, while "weighed heavily" by this Court in the Skinner case, as respondent suggests, was not the constitutional question involved. Did the Oklahoma law discriminate amongst thrice convicted felons under Oklahoma law? This Court held that such discrimination existed.

Turning to this case, discrimination against petitioner because of allegedly violating the narcotic laws for a third time obtains as it does against no other twice or thrice convicted offender of other Federal laws. We contend that such punishment as imposed herein, is also "devastating," but we do not ask this Honorable Court to weigh the "devastating nature" of the punishment imposed here so much as we do ask this Court to weigh the discriminatory phases of this legislation for the first time, and to strike this legislation down because it does discriminate against petitioner, and is unconstitutional in contravention of the Fourteenth Amendment.

Conclusion

Petitioner respectfully submits that the unusual circumstances herein involved have no counterpart in any of the Federal reports that we can find covering Federal cases involving Federal prisoners where the subject of ex post facto laws are concerned.

These unusual circumstances confronting petitioner, growing out of the information filed against him under the provisions of Section 2557, merits the closest scrutiny of this Honorable Court. For the first time in this Court is the question raised of the constitutionality of the Harrison Anti-Narcotic Habitual Criminal Law. In this law violative of Article 1, Section 9, Clause 3, of the Constitution?; is this law violative of the Fifth Amendment wherein a term of imprisonment greater than a year and in prison can be imposed on a criminal information (exclusive of being charged by presentment or indictment of a Grand Jury)?; is this law violative of the Fourteenth Amendment?; is this law violative of the double jeopardy guaranty of the Constitution?

The answers to these questions covering the constitutionality of the statute challenged here, and the proper disposition of this case because of the facts involved covering the *previous* convictions *prior* to the enactment of the statute, can best ensue only by the fulsome consideration of this Court through the granting of a re-hearing, the granting of the writ prayed for, and decision thereafter by this Court setting a precedent so that in future there occur no confusion

or attendant injury to any prisoner before the bar in like circumstances.

To this end, petitioner subscribes his prayer that this Honorable Court grant the pleas herein made.

Respectfully submitted,

CHARLES BELAND,
Petitioner Pro Se.